In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-116

DIANE M. PLACE, PETITIONER

v.

CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner, a female employee of the Department of Health, Education and Welfare, challenges the dismissal, for want of jurisdiction, of her suit alleging federal employment discrimination. She claims that Section 717(c) of the Equal Employment Opportunity Act of 1972, 42 U.S.C. (Supp. II, 1972 ed.) 2000e-16c, confers jurisdiction on federal district courts to entertain complaints asserting pre-March 24, 1972 (the effective date of the Act) instances of discrimination where an administrative complaint concerning such discrimination was pending and not finally determined on March 24, 1972.

Petitioner filed an administrative complaint on September 24, 1971, with her agency, alleging that she was discriminated against in her employment because of

her sex. The administrative complaint was denied, and on August 15, 1972, that denial was affirmed by the Board of Appeals and Review of the Civil Service Commission. This action was commenced in federal district court on September 13, 1972.

Petitioner asserted jurisdiction pursuant to Section 717(c) of the 1972 Act, which became effective on March 24, 1972. The district court dismissed the action "for lack of subject matter jurisdiction" (Pet. App. 9a-10a) on the ground that "Congress did not intend Section [717(c)] to apply to discriminatory acts that occurred prior to March 24, 1972" (Pet. App. 3a), such as those alleged by petitioner in her complaint. The court also noted that plaintiff had never presented to the agency claims of employment discrimination allegedly occurring subsequent to the enactment of the 1972 Act (Pet. App. 4a). Accordingly, the dismissal was "without prejudice" (Pet. App. 9a, 10a). The court of appeals, in an opinion reported at 497 F. 2d 412, affirmed on essentially the same grounds.

1. Petitioner urges review by this Court because of a conflict between the decision below and *Koger* v. *Ball,* 497 F. 2d 702 (C.A. 4). The conflict, however, is a narrow one, involving a question which is not of continuing significance.

In *Koger* v. *Ball,* the Fourth Circuit held that Section 717(c) conferred jurisdiction on the district courts to entertain complaints of pre-March 24, 1972 acts of federal employment discrimination where an administrative complaint alleging such discrimination was, like the instant complaint, pending and not finally determined on March 24, 1972. Subsequently, however,

in Clark v. Goode, 499 F. 2d 130 (C.A. 4), that court held that Section 717(c) did not confer jurisdiction on the district courts to entertain complaints of pre-March 24, 1972 acts of discrimination where the administrative complaint was finally determined prior to March 24, 1972. The conflict, therefore, involves only the narrow question of whether the Act confers jurisdiction over complaints alleging pre-March 24, 1972 acts of federal employment discrimination where an administrative complaint was pending and not finally determined on March 24, 1972.[1] This question is not of continuing significance, since a federal employment discrimination suit under Section 717(c) must be commenced "[w]ithin thirty days of receipt of notice of final [agency] action". Accordingly, the government decided not to file a petition for a writ of certiorari in *Koger,* notwithstanding the conflict with the decision below.

Petitioner's contention that the holding below might prevent employees from obtaining back pay for wages unlawfully denied them through discrimination occurring prior to March 24, 1972, but continuing thereafter, also applies only to a narrow category of cases which will not recur, since 42 U.S.C. (Supp. II, 1972 ed.) 2000e-5(g), governing federal employment discrimination suits, specifically provides that "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the [Equal Employment Oppor-

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[1] *Koger* was decided on May 10, 1974. In rendering its decision here on May 15, 1974, the court below indicated no awareness of *Koger*, and petitioner did not seek a rehearing.

The District of Columbia Circuit has recently adopted the reasoning of *Koger* in *Womack* v. *Lynn*, C.A. D.C., No. 72-1827, decided October 1, 1974.

tunity] Commission." Thus, the Act in any event prohibits the award of back pay for any period prior to March 24, 1972, in suits involving administrative complaints filed on or after March 24, 1974.

2. The district court specifically dismissed petitioner's complaint "without prejudice" in order to permit her to seek judicial review of final action on a properly framed administrative complaint alleging employment discrimination occurring on or after March 24, 1972. Accordingly, the denial of this petition would in no way diminish the remedies available to petitioner under the Act for any alleged discrimination against her since that date.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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